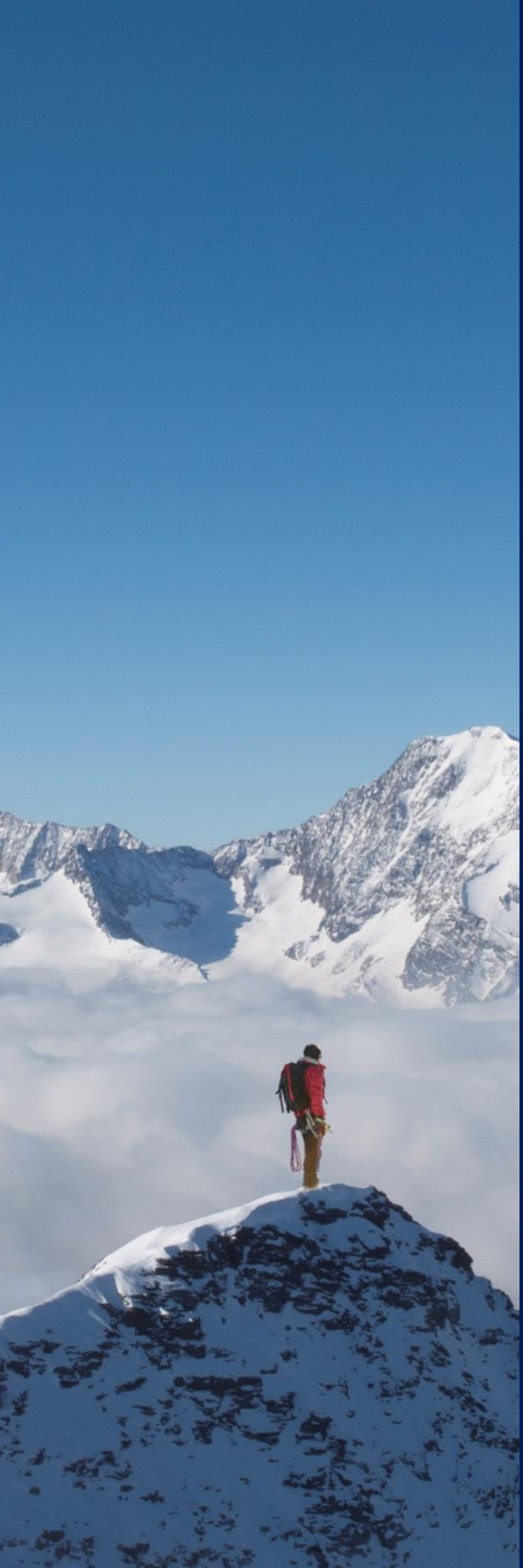


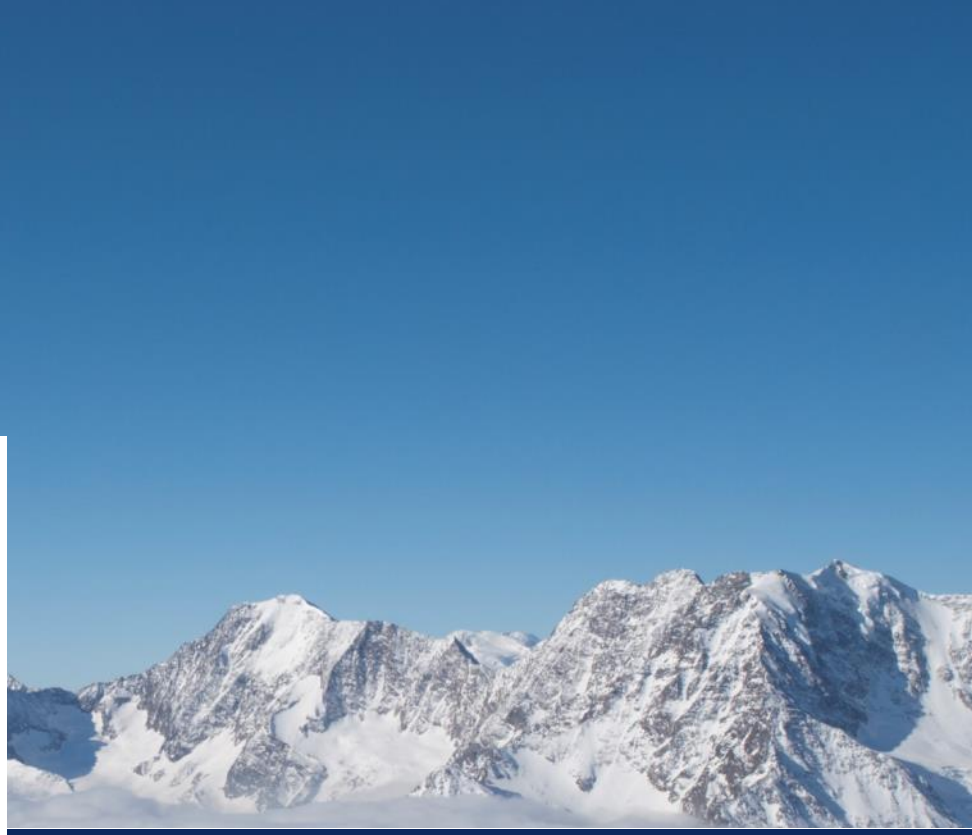
DREW & NAPIER

Ignore an Arbitration at Your Own Risk

***DEM v DEL* [2025] SGCA 1**

6 February 2025

LEGAL UPDATE



In this Update

In *DEM v DEL* [2025] SGCA 1, the Court of Appeal considered among other things whether a non-participating party to an arbitration can challenge the award on grounds that the arbitrator failed to consider a point which was not put in issue.

The Court of Appeal dismissed the appeal, and held that although the arbitrator did not consider the issue, the appellant was not entitled to rely on this ground to challenge the award because he chose not to participate in the arbitration.

INTRODUCTION

In *DEM v DEL* [2025] SGCA 1 the Court of Appeal considered an interesting point of law on whether a non-participating party to an arbitration can challenge the award on grounds that the arbitrator failed to consider a point which was not put in issue.

This is known as an *infra petita* challenge, which broadly refers to a situation where an arbitrator fails to consider one of the parties' submissions.

Although the Court of Appeal found that the arbitrator did not address the point in question (i.e. that there had been a lack of consideration), the Court of Appeal held that the appellant could not rely on *infra petita* to challenge the award because he chose not to raise the issue during the arbitration, by virtue of his non-participation.

The Court of Appeal also considered that despite the notice of arbitration not being served on the appellant, he had actual notice and therefore could not rely on a lack of notice to challenge the award.

PROCEDURAL HISTORY

The respondent company ("**W Co**") was incorporated by **Ms U** for the purpose of acquiring a franchised enrichment centre ("**Franchise**").

The sellers were the appellant (**Mr X**), **Z Co**, and **Ms Y** (the sole legal owner of Z Co).

Multiple agreements were signed, including a Business Purchase Agreement ("**BPA**") for purchase of the Franchise for S$200,000.

After the sale, W Co discovered that the Franchise was generating significantly less revenue than expected because the appellant, Ms Y and Z Co had diverted clients and staff to a new enrichment centre, misappropriated teaching curriculum and misrepresented the Franchise's revenue potential.

On 29 October 2019, W Co commenced SIAC arbitration against the appellant, Ms Y and Z Co for breach of various agreements including the BPA, and applied to have a consolidated arbitration. After consolidation was rejected by the SIAC, W Co informed SIAC that it would only continue with arbitration under the BPA.

On 14 August 2020, W Co filed a notice of arbitration ("**2020 NOA**") against the appellant, Ms Y and Z Co in relation to the BPA for misrepresentation and against the appellant for breach of confidentiality, non-compete and non-solicit covenants.

A sole arbitrator was appointed. On 20 August 2021, W Co reached a settlement with Ms Y and Z Co. The arbitration then proceeded against the appellant only, and the hearing took place as scheduled on 8 September 2021.

After the arbitration, an unknown email address purported to be the appellant and emailed the arbitrator asking for correspondence relating to the arbitration. Despite attempts to verify the sender's identity and engage with him, no further communication was received.

It was only after the award was published, and W Co sought to enforce the award and applied for substituted service on the appellant, that the appellant re-emerged in July 2023. He applied to set aside the award on four grounds of lack of notice, failure to consider an essential issue, breach of natural justice and breach of public policy.

The High Court dismissed his application (*DEM v DEL* [2024] SGHC 80).

THE COURT OF APPEAL'S DECISION

On appeal, the appellant relied on three grounds of lack of notice, failure to consider an essential issue, and breach of natural justice.

Infra Petita

An *infra petita* challenge is directed at the tribunal's failure to deal with matters within the scope of submission to the tribunal. As noted by the Court of Appeal, it is often seen as the flipside to *ultra petita* (i.e. where the tribunal deals with matters outside the scope of submission to arbitration).

KEYPOINT

Infra petita challenges should be better rationalised as a separate and independent natural justice challenge, and not under Article 34(2)(a)(iii) of the Model Law

Despite local decisions which consider both types of challenges (*infra petita* and *ultra petita*) as falling within the ambit of Article 34(2)(a)(iii) of the Model Law, the Court of Appeal held that *infra petita* challenges should be better rationalised as a separate and independent natural justice challenge rather than under Article 34(2)(a)(iii) of the Model Law.

The plain wording of Article 34(2)(a)(iii) refers to awards dealing with disputes "*not completed by or not falling within*" or "*beyond the scope*" of the submission to arbitration. It contemplates the tribunal exceeding its jurisdiction.

The Court of Appeal held that rationalising *infra petita* challenges as a separate and independent natural justice challenge would be consistent with local cases which recognise that failure to consider an important issue in the arbitration would manifestly be a breach of natural justice. On this basis, the principles that apply to natural justice challenges apply equally to *infra petita* challenges.

The Court of Appeal held that it is not open to a party to raise an *infra petita* challenge where the party elected not to participate, did not file pleadings, and consequently failed to raise the issue that is the subject matter of his *infra petita* challenge.

Allowing the appellant to raise the infra petita challenge would have been permitting "*hedging of the most egregious form*". The Court of Appeal held that where an issue was not properly brought before the tribunal, an aggrieved party should not be allowed to complain about the tribunal's failure to consider the same.

Citing an earlier decision in *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98, the Court of Appeal reiterated that the disputes which parties choose to submit for arbitration demarcate the jurisdiction of the arbitral tribunal.

The *infra petita* challenge therefore failed, as the issue (of lack of consideration) had not been properly brought before the arbitrator for her determination.

KEYPOINT

Where an issue was not properly brought before the tribunal, an aggrieved party should not be allowed to complain about the tribunal's failure to consider the same

Notice

Despite the 2020 NOA not being served on the appellant, the Court of Appeal held that the appellant did have notice.

The purpose of Rule 3.4 of the SIAC Rules was to give the other party notice of the arbitration. However it was not mandatory in the sense that non-service would *per se* be fatal to the award, provided the evidence is clear that the other party had proper notice. For this purpose, notice may be actual or deemed.

The Court of Appeal considered the distinction between the concepts of "*notice*" and "*service*". Although personal service is typically how actual notice is demonstrated, the relevant inquiry is whether a party was

adequately notified of the arbitration such that it was given a full opportunity to participate.

The final analysis is on the substance of the notice and not its form.

On the facts, the appellant had actual notice of the arbitration by 8 September 2021 when he emailed the arbitrator. This was a situation where the appellant had elected to remain silent notwithstanding all efforts to notify him of the arbitration.

The Court of Appeal also considered that in any event, the appellant had deemed notice of the arbitration by virtue of the "Notices" clause in the BPA which stated his residential address and an email address. The 2020 NOA had been sent to those addresses, and he was deemed to have received the documents.

KEY LEARNING POINTS

On the law, the Court of Appeal has helpfully rationalised the doctrinal basis of *infra petita* challenges as being independent natural justice challenges rather than subsumed under Article 34(2)(a)(iii) of the Model Law.

In practical terms, any party faced with arbitration must understand the potential risks of their dispute resolution strategy. Although defending an arbitration incurs costs, a strategy of ignorance is incredibly risky. If there is a defence to run, then participating in the arbitration is vital to ensure that the defence is properly ventilated and considered by the arbitrator.

Choosing not to participate can have disastrous consequences.

There is no second bite of the cherry when the first bite is offered and refused.

If you have any questions or comments on this article, please contact:

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